

IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF CALIFORNIA

GILBERTO MALDONADO,	)	No. CV-F-07-1536 OWW
	)	(No. CR-F-02-5408 OWW)
	)	
Petitioner,	)	MEMORANDUM DECISION AND
	)	ORDER DENYING PETITIONER
vs.	)	GILBERTO MALDONADO'S MOTION
	)	TO VACATE, SET ASIDE OR
	)	CORRECT SENTENCE PURSUANT TO
UNITED STATES OF AMERICA,	)	28 U.S.C. § 2255 AND
	)	DIRECTING CLERK OF COURT TO
	)	ENTER JUDGMENT FOR
Respondent.	)	RESPONDENT
	)	
	)	

On October 22, 2007, Petitioner Gilberto Maldonado filed a motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255.

Petitioner was found guilty following jury trial of conspiracy to aid and abet the manufacture of methamphetamine and to possess pseudoephedrine knowing or having reasonable cause to believe it would be used to manufacture methamphetamine; attempted possession of pseudoephedrine with the intent to

1 manufacture methamphetamine and aiding and abetting; use of a  
2 communications facility to facilitate a drug trafficking crime,  
3 and criminal forfeiture. Petitioner was sentenced on June 15,  
4 2005 to a total term of 210 months. Petitioner appealed to the  
5 Ninth Circuit. On July 15, 2005, a Recommendation for Drug  
6 Program was filed, at the request of Maldonado's counsel, wherein  
7 it was recommended that Maldonado "participate in the Bureau of  
8 Prisons 500-Hour Drug Abuse Program, if it is deemed he is a  
9 proper candidate within the Bureau of Prisons Guidelines." On  
10 August 18, 2006, Petitioner's conviction was affirmed by the  
11 Ninth Circuit. Petitioner did not challenge his sentence on any  
12 ground on appeal. See *United States v. Sepulveda*, 2006 WL  
13 2085392 (9<sup>th</sup> Cir.2006).

14 A. Ineffective Assistance of Counsel.

15 Petitioner asserts that he was denied the effective  
16 assistance of counsel at sentencing because his counsel failed to  
17 argue that Petitioner qualified for a downward departure based on  
18 the more onerous conditions imposed on aliens in federal prison  
19 and failed to "properly argue" that Petitioner was entitled to a  
20 mitigating role adjustment pursuant to USSG § 3B1.2 "as either:  
21 1) a Minimal Participant for a 4 level departure; 2) a Minor  
22 Participant for a 2 level departure; or 3) where on the facts  
23 submitted, cases falling in between are to be decreased by 3  
24 Levels."

25 A petitioner who fails to raise non-constitutional  
26 sentencing errors on appeal waives his right to challenge the

1 errors in a Section 2255 motion. *United States v. Schlesinger*,  
2 49 F.3d 483 (9<sup>th</sup> Cir.1994). A petitioner may raise such alleged  
3 sentencing errors in a Section 2255 motion if he can show both  
4 cause for their failure to make the objection earlier and  
5 prejudice from that failure. *United States v. McMullen*, 98 F.3d  
6 1155, 1157 (9<sup>th</sup> Cir.1996), *cert. denied*, 520 U.S. 1269 (1997).  
7 Establishing the elements of an ineffective assistance of counsel  
8 claim normally will meet this cause and prejudice test. *Id.* The  
9 elements established by the Supreme Court for prevailing on an  
10 ineffective assistance of counsel claim are: (1) the petitioner  
11 "must show that counsel's representation fell below an objective  
12 standard of reasonableness"; and (2) the petitioner "must show  
13 that there is a reasonable probability that, but for counsel's  
14 unprofessional errors, the result of the proceeding would have  
15 been different." *Strickland v. Washington*, 466 U.S. 668, 688  
16 (1984).

17 Petitioner's contention that he was denied the effective  
18 assistance of counsel because of counsel's failure to argue that  
19 Petitioner's role in the offense was minor is without merit.  
20 Counsel specifically argued at sentencing that Petitioner's role  
21 in the offense was minor and that he was entitled to a two-level  
22 reduction in the offense level for his role. (CT, June 13, 2005  
23 pp.5-6, 8). Counsel's request for a downward departure based on  
24 his minor role in the offense was rejected by the Court. The  
25 facts proved at trial showed that Petitioner was an active  
26 participant in the conspiracy to purchase pseudoephedrine to

1 manufacture methamphetamine and that Petitioner provided money to  
2 facilitate the purchase of pseudoephedrine. Petitioner presents  
3 nothing to support his contention that a "proper" argument by  
4 counsel would have resulted in the Court reducing Petitioner's  
5 sentence based on his role in the offense. Counsel's argument  
6 cannot overcome the evidence.

7 Petitioner argues that counsel was ineffective because he  
8 failed to argue for a downward departure based on Petitioner's  
9 status as a deportable alien. Petitioner has not demonstrated  
10 ineffective assistance of counsel because Petitioner cannot  
11 demonstrate a reasonable probability that the result would have  
12 been different if counsel had so argued, i.e., that the Court  
13 would have reduced Petitioner's sentence because his status as an  
14 alien made him ineligible for certain BOP programs.

15 A District Court had discretion to depart downward due to  
16 deportable alien status only after determining that this factor  
17 "takes the case outside of the 'heartland.'" *United States v.*  
18 *Charry Cubillos*, 91 F.3d 1342, 1344 (9<sup>th</sup> Cir.1996), quoting *Koon*  
19 *v. United States*, 518 U.S. 81 (1996).<sup>1</sup> Nothing in the record of

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20  
21 <sup>1</sup>In *United States v. Mohamed*, 459 U.S. 979, 987 (9<sup>th</sup> Cir.2006),  
the Ninth Circuit explained:

22 ... [W]e elect to review a district court's  
23 application of the advisory sentencing  
24 guidelines only insofar as they do not involve  
25 departures. To the extent that a district  
26 court has framed its analysis in terms of a  
downward or upward departure, we will treat  
such so-called departures as an exercise of  
post-*Booker* discretion to sentence a defendant  
outside of the applicable guideline range. In

1 this action compels a conclusion that the fact of Petitioner's  
2 alien status takes the case outside of the heartland of typical  
3 cases involving the sentencing of convicted drug offenders and  
4 the Court would not have granted a request for a downward  
5 departure on this basis. Defendant was a knowing participant in  
6 a conspiracy to manufacture methamphetamine and to possess  
7 pseudoephedrine knowing it would be used to manufacture  
8 methamphetamine. Although Petitioner's criminal history did not

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9  
10 order words, any post-Booker decision to  
11 sentence outside of the applicable guidelines  
12 range is subject to a unitary review for  
reasonableness, no matter how the district  
court styles its sentencing decision.

13 We do not mean to suggest, however, that the  
14 pre-Booker system of departures should be  
15 ignored. That system reflects the Sentencing  
16 Commission's judgment about what types of  
17 considerations should or should not take a  
18 case out of the 'heartland of typical cases'  
19 such that an extra-guideline sentence would be  
20 justified. *Koon v. United States*, 518 U.S.  
21 81, 94 ... (1996). If a district court's  
22 reasons for exercising its post-Booker  
23 discretion coincide with the factors allowed  
24 or encouraged under the pre-Booker system of  
departures, such overlap may suggest that the  
sentencing decision was reasonable ... Our  
holding today does not preclude consultation  
of the system of departures that existed under  
the mandatory regime, either by the district  
court or by this court. Rather, out of a  
recognition that the concept of formal  
departures is anachronistic, we hold that any  
deviation from the applicable advisory  
guideline range will be viewed as an exercise  
of the district court's post-Booker discretion  
and reviewed only for reasonableness.

25 *Mohamed* thus underscores that the holding in *Charry Cubillos*  
26 remains good authority following *Booker*.

1 involve prior drug offenses, his criminal history category was II  
2 and Petitioner had three prior drug-related arrests.  
3 Consequently, counsel's failure to request a downward departure  
4 in the calculation of Petitioner's sentence because of his status  
5 as an alien was not ineffective assistance of counsel.

6 B. VIOLATION OF RIGHT TO SPEEDY TRIAL.

7 Petitioner asserts that his constitutional right to a speedy  
8 trial was violated. Petitioner asserts that he was arraigned on  
9 December 20, 2002, but his trial did not start until June 2,  
10 2004. Petitioner contends:

11 To the best of my knowledge and belief;  
12 during this 18 month time frame, the District  
13 Court failed to make the proper findings  
14 regarding the ends of justice requirement for  
the delay pursuant to Title 18 U.S.C. Section  
3161(h) (8) .

15 Petitioner cites *Zedner v. United States*, 547 U.S. 489  
16 (2006). In *Zedner*, the Supreme Court ruled that a defendant may  
17 not prospectively waive the Speedy Trial Act "for all time"  
18 without compliance by the District Court with requirements of  
19 Section 3161(h) (8) .

20 Petitioner's motion is without merit. *Zedner* does not apply  
21 because there was no blanket waiver by Petitioner of the Speedy  
22 Trial Act. There was no request for and exclusion of time under  
23 the Speedy Trial Act pursuant to Section 3161(h) (8) . Rather, the  
24 docket establishes that specific exclusions of time under the  
25 Speedy Trial Act were made by Judge Coyle on lawful grounds for  
26 excluding time throughout the pretrial proceedings prior to the

1 transfer of the action to Judge Wanger for jury trial.  
2 Petitioner makes no contention or showing that any of the  
3 exclusions of time made by Judge Coyle were improperly made under  
4 the Speedy Trial Act or that the Speedy Trial Act was otherwise  
5 violated. To the contrary Petitioner makes no reference to the  
6 record, rather he only makes a conclusory assertion on  
7 information and belief.

8 C. INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

9 Petitioner contends that he was denied the effective  
10 assistance of appellate counsel because of appellate counsel's  
11 failure to assert on appeal that Petitioner's sentence should  
12 have been reduced because of his minor role in the offense and  
13 his status as an alien, and that the Speedy Trial Act was  
14 violated because of the failure to comply with the requirements  
15 of Section 3161(h)(8). Because Petitioner has not demonstrated  
16 that he is entitled to relief on any of these grounds, his claim  
17 of ineffective assistance of appellate counsel fails.

18 For the reasons stated:

19 1. Petitioner's motion to vacate, set aside or correct  
20 sentence pursuant to 28 U.S.C. § 2255 is DENIED;

21 2. The Clerk of the Court is directed to enter Judgment for  
22 Respondent.

23 IT IS SO ORDERED.

24 Dated: May 21, 2008

/s/ Oliver W. Wanger  
UNITED STATES DISTRICT JUDGE